

SUPREME COURT OF THE UNITED STATES

Ernest Stewart, \*  
Petitioner, January Term, 1947

-vs-

The State of Ohio, Respondent. \* Case No. ....

PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF OHIO

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Ernest Stewart, in support of his petition for a writ of certiorari to review the final judgment of the Supreme Court of Ohio, entered on the 17th day of October, 1946, affirming his conviction in the Common Pleas Court of Montgomery County, Ohio, on the 4th day of June, 1945, for an alleged misdemeanor, to wit:- contributing to the delinquency of a minor under the age of 18 years, respectfully shows:

## A

## SUMMARY STATEMENT OF THE MATTER INVOLVED

This proceeding was initiated by an affidavit filed on the 2nd day of May, 1945, by Rudolph J. Rado, a police officer of the city of Dayton, Ohio, in the Common Pleas Court of Montgomery County, Ohio, Division of Domestic Relations as cause no. 22864, J. C., Docket 39; said affidavit charged petitioner with contributing to cause the delinquency of a minor under the age of eighteen years, as therein specified. To which on the 3rd day of May, 1945, petitioner entered a plea of "Not Guilty"; that on the 31st day of May, 1945, at the April Term of said Court, the aforesaid cause came on for hearing before a jury; that after

the jury had been selected the prosecuting attorney requested leave of court to amend said affidavit by inserting the following-

"It is further charged that the defendant has been formerly convicted, sentenced and imprisoned for a misdemeanor under the laws of Ohio." Said amendment was permitted by the Court over the objection and exception of counsel for petitioner duly noted.

### THE CONVICTION AND SUBSEQUENT PROCEEDINGS

Thereupon the evidence and testimony where adduced and on the 4th day of June, 1945, the jury returned a verdict of "Guilty"; that within three days thereafter, to-wit: on the 6th day of June, 1945, petitioner filed a motion for a new trial, and thereafter on the 22nd day of June, 1945, said motion having been overruled by the Court; and the Court having sentenced the petitioner to be committed to the workhouse of the city of Dayton, Ohio for a period of one (1) year, and further ordered that the petitioner pay a fine in the amount of Five Hundred Dollars (\$500.00), and the costs of prosecution; and the court having awarded execution and granted a supersedeas bond pending petitioner's appeal to the Court of Appeals of Montgomery Court, Ohio, Second Judicial District, being case No. 1876 C. A., on the docket thereof, styled State of Ohio, plaintiff-appellee, vs. Ernest Stewart, defendant-appellant, and thereafter on the 23rd day of February, 1946, the Court of Appeals having ordered its Mandate issued to said Court of Common Pleas, having granted a supersedeas bond pending the outcome of petitioner's appeal as a matter of right to the Supreme Court of Ohio, being case No. 30688 on the docket thereof styled, State of Ohio, plaintiff-appellee, vs. Ernest Stewart, defendant-appellant; and thereafter said Supreme Court having denied the appeal of the Petitioner and remanded the case to the Montgomery County Court of Appeals by its order dated October 9, 1946, attested by Seba H. Miller, Clerk of said Supreme Court under date of October

16, 1946; and thereafter on the 17th day of October, 1946, said Court of Appeals having issued its Mandate to the Court of Common Pleas of Montgomery County, Ohio, and said mandate coming on to be carried into execution on this 19th day of December, 1946; said Common Pleas Court granted a supersedeas bond pending this Petition for a Writ of Certiorari to the Supreme Court of Ohio.

This petition is filed within three (3) months thereafter.

### CORRECTION

Page 3 under "B Statement of Jurisdiction of this court, Sub Section 1, Statutory provision believed to sustain the jurisdiction," Should be corrected to read as follows.

"The final judgement of the Court below was entered December 19, 1946. The Jurisdiction of this court is invoked under section 8 of the act of February 13, 1925."

charged that the defendant has been formerly convicted, sentenced and imprisoned for a misdemeanor under the law of Ohio" is a violation of amendment V to the Constitution of the United States on Rights of persons, which provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb" and (2.) a violation of Article 1, Section 10 of the Ohio Constitution of 1851 as amended in 1912, which provides "that a person shall not be put in jeopardy twice for the same offense" and (3.)

a violation of Section 13,444-17 of the General Code of Ohio, which reads as follows:

"Rebuttal of defendant's character evidence, when the defendant offers evidence of his character or reputation the prosecution may offer in rebuttal thereof, proof of his previous conviction of a crime involving moral turpitude, in addition to other competent evidence";

and (4.) whether sections 4130 and 4131 and sections 13457-1 and 13457-2 of the General Code of Ohio, which require the fact of former convictions to be charged in the information or complaint, are violative of the aforesaid constitutional provisions.

#### **D**

#### **CONSTITUTIONS AND STATUTES INVOLVED**

The Constitutions and Statutes involved are set forth in the Brief presented herewith.

#### **E**

#### **STATEMENT**

The findings of fact of the Supreme Court of Ohio may be summarized as follows:-

"This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Montgomery County, upon the Motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby, is dismissed for the reason no debatable constitutional question is involved in said cause."

#### **F**

#### **SPECIFICATION OF ERRORS TO BE URGED**

The Supreme Court of Ohio erred:

1. In not declaring said Section 4130 and 4131 and

13457-1 and 13457-2 of the General Code of Ohio unconstitutional as violative of aforesaid Amendment V of the United States Constitution and Article 1, Section 10 of the Ohio Constitution of 1851 as amended in 1912.

2. In finding that no debatable constitutional question was involved.

G.

### REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

In ruling as it has that the said prosecuting attorney properly amended the affidavit to include former offenses the petitioner was held to answer again to the jury for offenses for which he had paid the penalty and was thereby put in jeopardy again in violation of aforesaid Constitutional guaranties.

### CONCLUSION

The question presented is of grave public importance.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Supreme Court of Ohio, commanding said court to certify and sent to this court a full and complete transcript of the record and of the proceedings of said Supreme Court of Ohio in the case numbered and entitled on its docket No. 30688, State of Ohio, plaintiff-appellee, vs. Ernest Stewart, defendant-appellant, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment of said Supreme Court be reversed by this court, and your petitioner prays that the certified copy of the record and proceedings of said Supreme Court, filed with this petition, may be treated as a return to said writ of certiorari, and your petitioner prays that he may have such other and further remedies in the premises as to the court may seem appropriate and in conformity with law.

Petitioner

Ernest Stuart

Address

1007 Germantown St

Attorney for Petitioner

Herbert E. Saltsman

Address

402 Commercial Bldg  
Dayton, 2, Ohio

SUPREME COURT OF THE UNITED STATES

Ernest Stewart,  
Petitioner,

-vs.-

Case No. ....

The State of Ohio,  
Respondent.

BRIEF ON BEHALF OF  
SAID PETITIONER

Merritt E. Schlafman,  
Attorney at Law,  
402 Commercial Building,  
Dayton 2, Ohio,

Attorney for Ernest Stewart, Petitioner,

Mathias H. Heck, Prosecuting Attorney,  
Montgomery County, Ohio,  
206 Court House Annex,  
Dayton 2, Ohio,

Represented by Robert W. Schroader,  
Assistant Prosecuting Attorney,  
Attorney for the State of Ohio,  
Respondent.

ASSIGNMENT OF ERRORS:-

The trial Court erred in permitting the Prosecuting Attorney to amend the affidavit charging the petitioner with violating a misdemeanor, to-wit: contributing to the delinquency of a minor under the age of eighteen (18) years, by inserting therein the following: "It is further charged that the defendant has been formerly convicted, sentenced and imprisoned for a misdemeanor under the law of Ohio", over the objection and exception of the attorney for petitioner. (See Page 1, beginning at line 1 to line 12 inclusive of the Transcript of Testimony and Bill of Exceptions filed herein).

The trial Court erred in refusing to sustain the motion of petitioner for a new trial predicated upon the foregoing objection.



## STATEMENT OF THE CASE:-

The petitioner was originally charged with contributing to the delinquency of a minor under the age of eighteen years. After the jury had been impanelled and sworn and before the presentation of the evidence the Prosecuting Attorney asked leave to amend his original affidavit by adding the following: "It is further charged that the defendant has been formerly convicted, sentenced and imprisoned for a misdemeanor under the law of Ohio." Permission so to do was granted by the Court over the objection and exception of the attorney for the defendant, petitioner herein.

## STATEMENT OF THE QUESTION OF LAW:-

The Prosecuting Attorney predicated his request upon Section 4130 of the General Code of Cumulative Sentence, which provides in effect that every person, who after having been convicted, "is convicted of a second misdemeanor", shall for such offense receive double his punishment as received in the first offense. Section 4131 on Habitual Offender, that is, one convicted the fourth time for a misdemeanor, contains this language, "the fact of former convictions shall be charged in the information or complaint and if proved shall be stated in the commitment." These two sections appear in the Chapter dealing with Reformatory Institutions. Under another Chapter, we find in the General Code Section 13457-1, which provides when Cumulative Sentence may be imposed; the only difference between the two sections seems to be limiting the latter to misdemeanors involving moral turpitude.

We believe that permitting the Affidavit to be so amended is violative of Article 1, Section 10 of the Ohio Constitution of 1851 as amended in 1912, which provides that a person shall not be put in jeopardy twice for the same offense; and of Amendment V to the Constitution of the United States on Rights of Persons, which provides, "nor shall any person be

■



subject for the same offense to be twice put in jeopardy of life or limb." It is also in violation of Section 13,444-17, which reads as follows:

"Rebuttal of defendant's character evidence. When the defendant offers evidence of his character or reputation the prosecution may offer in rebuttal thereof, proof of his previous conviction of a crime involving moral turpitude, in addition to other competent evidence."

We believe that it was in order to avoid the foregoing objections that under the habitual criminal law in felony cases as set forth in Section 13,744-1 et sequentis, it was provided that, after two previous convictions, in order to bring the defendant under said law it is necessary under Section 13,744-3 "to cause an indictment to be returned charging the said person with such previous convictions" and in that case the issue to be tried is "whether or not he is the same person as charged in such previous convictions set forth in the indictment." In other words under the felony procedure it is a two-step proposition, two separate and distinct trials; whereas under the misdemeanor procedure it is only one trial with two questions involved.

The Court of Appeals in denying our contention relied upon two cases, to-wit: Larney vs. Cleveland, 34 O. S. 599 and Blackburn vs. State, 50 O. S. 428. An examination of both of those cases will show that the question presented here was not passed upon by the Court in either of them. In the Larney case the question was not even raised as to constitutionality; in the Blackburn case, which was one involving a felony, the Court held it not unconstitutional as being retroactive or ex post facto as to a person who had two previous convictions made before the passage of a law providing a greater penalty for conviction of violating a law three times.

Although all three of the judges concurred in the opinion involving the question we presented yet it is

significant to call this to the attention of the Court. During the presentation of our argument, Judge Hornbeck asked, "Hasn't this question been decided?" Subsequently our examination of the law showed us that this same Judge Hornbeck wrote a decision on November 3, 1938, State vs. Mahoney, 53 Ohio app. 58, or 12 O. O. 367, in which in the latter reference at page 369, second paragraph, he said:

"The procedure set forth in Section 13744-3 not only stands the test of authority, but it is eminently fair to the defendant. The charge that he is an habitual offender follows and is separate and apart from the indictment charging him with the commission of the felony constituting the third or fourth offense. He is tried upon that offense as though it were the first and without any prejudice which might result to him were he required to face an indictment not only charging the third or fourth offense but also setting forth other offenses which, taken together, constitute him an habitual offender."

Our contention is the corollary to the judge's statement. In the present case the statement as to previous convictions is stated in the same affidavit and is not "separate and apart"; this defendant was prejudiced thereby.

We contend that these sections dealing with cumulative sentences in misdemeanor cases by permitting requiring that previous convictions be pleaded in the same affidavit were in conflict with General Code Section 13444-17, which provided:

"When the defendant offers evidence of his character or reputation, the prosecution may offer in rebuttal thereof, proof of his previous conviction of a crime involving moral turpitude, in addition to other competent evidence."

The Court of Appeals said that this section refers to the admission of evidence after the defendant has offered evidence as to his character and that General Code Sections 4130 and 4131 are not on this subject and therefore there can be no conflict. No authorities were cited to substantiate this position. It is generally known in a criminal case that as a rule there are only two ways in which previous convictions can be brought to the attention of the jury; first, if the defendant offers evidence of good character, then under the Section above quoted, the prosecution may show previous convictions in rebuttal thereof; the second way is that if the defendant takes the stand himself he is subject to the same treatment as any other witness and that he can be questioned as to previous convictions on the basis of attacking the credibility of the witness. If such be the state of the law then isn't it correct to interpret the above quoted law to be as though it read that the prosecution can not offer proof of previous convictions unless the defendant offers evidence of his character or reputation? If that is a fair reading of the law, then isn't it in conflict with the law that says the prosecution must allege in the same affidavit with the offense charged previous offenses of the defendant? And isn't all this protection against previous offenses merely for the purpose of protecting a defendant's constitutional rights?

Not long ago one of our local judges in discussing such situations made this observation that in a civil case if some one even breathes or intimates that an insurance company is involved, a mistrial immediately results; but we are not so concerned as to whether a defendant in a criminal case has been prejudiced. In otherwords, today we pay more attention to property rights than personal rights. If we want to be consistent in world affairs we had better begin recognizing and protecting human and constitutional rights.

It is highly significant in the instant case to call attention to the fact that after the jury had deliberated for some time upon the question, they asked further

instructions from the Court and upon inquiry in the presence of counsel the Court learned that the questions they had were as to the weight and credibility of witnesses; that is, as to how many witnesses testified as to a certain fact or facts and who were the witnesses testifying. The Court refused to give them any resume of the testimony. However, the fact of a former conviction having been alleged in the affidavit and proof thereof having been presented by the prosecution thereon might well have been the deciding factor which would cause them to weight the evidence against the defendant and return a verdict of "Guilty"; otherwise, if such were not in the case undoubtedly their uncertainty as to the testimony would have caused a verdict of "Not Guilty". We sincerely believe that the same was prejudicial to the rights of the defendant and prevented him from having a fair trial and was violative of his constitutional rights, and that it should have been admitted to the Supreme Court of Ohio as involving a debatable constitutional question.

Constitutional Sections and Statutes Involved:-  
Constitution of the United States:

Amendment V., Right of Persons

"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb".

Constitution of Ohio:

Article 1., Trial of Accused Persons and Their Rights

"No person shall be twice put in jeopardy for the same offense".

Ohio General Code:

Section 4130. Cumulative Sentence.

"Every person who, after having been convicted, sentenced and imprisoned, in any workhouse for an offense committed in this state in violation of an ordinance of a municipality, or law of the state, is convicted of a second misdemeanor whether committed in violation of an ordinance of a municipality or a law of this state, punishable by imprisonment in any workhouse, within this

state, shall for such second offense, be punished by imprisonment for not less than double the penalty imposed for the first offense, and in case of two previous convictions for such misdemeanors, he penalty for a third misdemeanor shall not be less than double the penalty imposed in the last of such previous misdemeanors. But no greater punishment shall be inflicted for the second or third misdemeanor, than the maximum penalty provided by law or ordinance for the particular offense committed."

#### Section 4131. Habitual Offender.

"Every person who, after having been three times convicted, sentenced and imprisoned in any workhouse or workhouses for offenses committed in this state, whether in violation of law or ordinance, shall be convicted of a fourth misdemeanor, whether committed in violation of an ordinance of a municipality or law of the state, punishable by imprisonment in any workhouse within this state, shall, upon conviction for such offense be held and deemed to be an habitual offender and shall be imprisoned in a workhouse for a period of not less than one year nor more than three years. In all such cases the Court may order that the offender stand committed to such workhouse until the costs of prosecution are paid. The fact of former convictions shall be charged in the information or complaint and, if proved, shall be stated in the commitment. A pardon for a former offense granted on the ground of innocence shall operate as a full defense in any charge under this section of a prior conviction for such offense."

#### Section 13457-1. When Cumulative Sentence May be Imposed.

"When a person is convicted of a misdemeanor involving moral turpitude under the law of this state, or an ordinance of a municipal corporation, and the judge or magistrate before whom such conviction is had, is authorized by law to commit

him to a workhouse, and previous conviction for any such misdemeanor, in this state or elsewhere, is proved against him, the sentence for the last offense shall not be less than double the penalty imposed for such previous offense. When two previous convictions for such offenses are proven against the offender, the sentence shall not be less than double the penalty imposed for the last of such previous offenses. This section shall not impose a penalty greater than the maximum now provided by law for such offenses in the aggregate."

#### Section 13457-2. Sentence of Habitual Offender.

"Whoever, having been three times convicted and sentenced for misdemeanor involving moral turpitude under the laws of this state or any ordinance of a municipal corporation in this state or elsewhere, is convicted of an offense involving moral turpitude, under the law of the state or an ordinance of a municipal corporation, and the judge or magistrate is authorized by law to commit the offender to the workhouse or jail, shall be an "habitual offender" and may be imprisoned in the workhouse or jail not less than one year, nor more than three years. In such cases the judge may order that such person shall stand committed to such workhouse or jail until the costs of prosecution are paid or he is discharged as hereinafter provided. Such repeated misdemeanors, as provided in this section and the next preceding section, shall be charged in the information or complaint made against such offender, and if proven, shall be stated in the commitment to the workhouse or jail."

#### Section 13444-17. Rebuttal of Defendant's Character Evidence.

"When the defendant offers evidence of his character or reputation, the prosecution may offer in rebuttal thereof, proof of his previous conviction



of a crime involving moral turpitude, in addition to other competent evidence."

**Section 13744-1. Habitual Criminal; Felon; Penalty.**

"A person convicted in this state of arson, burning property to defraud insurer, robbery, pocket-picking, burglary, burglary of an inhabited dwelling, murder of the second degree, voluntary manslaughter, assault to kill, rob or rape, cutting, stabbing, or shooting to kill or wound, forcible rape or rape of a child under twelve years of age, incest, forgery, grand larceny, stealing motor vehicle, receiving stolen goods of the value of more than \$35.00, perjury, kidnapping or child-stealing, who shall have been previously two times convicted of any of the hereinbefore specified felonies separately prosecuted and tried therefor, either in this state or elsewhere, shall be adjudged an habitual criminal and shall be sentenced by the court to a term of imprisonment equal to the maximum statutory penalty for such offense; provided that any of such convictions which result from or are connected with the same transaction, or result from offenses committed at the same time, shall be counted for the purpose of this section as one conviction."

**Section 13744-2. Same; Fourth Conviction; Penalty.**

"A person convicted in this state of any of the offenses in the next preceding section specified, who shall have been previously convicted three times of any of the said offenses, separately prosecuted and tried therefor either in this state or elsewhere, shall be adjudged an habitual criminal, and shall be sentenced to imprisonment for the term of his or her natural life; provided that any of such convictions which result from or are connected with the same transaction, or result from offenses committed at the same time, shall be counted for the purpose of this section as one conviction."



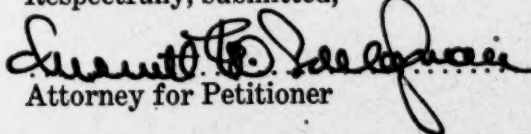
### Section 13744-3. Indictment; Plea; Procedure.

"If at any time either before or after sentence, it shall appear that a person convicted on one of the felonies enumerated in this act, has previously been convicted of felonies as set forth in the two preceding sections, it shall be the duty of the prosecuting attorney of the county in which such last conviction was had to cause an indictment to be returned charging the said person with such previous conviction. Whereupon the Court in which such last conviction was had shall cause the said person, whether confined in prison or not, to be served with a copy of such indictment and to be brought before such court. Such court shall inform the accused of his right to be tried as to the truth thereof, and shall require the accused to say whether he is the same person as charged in such previous convictions set forth in such indictment or not. If the accused says he is not the same person, or remains silent, the court shall enter a plea of not guilty, and a jury shall be impaneled to inquire whether the accused is the same person, as charged in such previous convictions set forth in said indictment. The accused may waive trial by jury and consent to be tried by the court. The usual procedure in the trial of criminal cases shall be followed in the impaneling of such jury and the trial under such indictment. If the accused pleads guilty to such indictment, or if the jury finds him guilty, or if the court finds him guilty after waiver of a jury, the court shall sentence him to the punishment prescribed in the two preceding sections, as the case may be, and shall vacate the previous sentence, if sentence has been imposed, deducting from the new sentence all time actually served by the defendant on the sentence so vacated.

Whenever, it shall become known to any warden, probation, parole, or other peace officer, that any person charged with or convicted of a felony has

been previously convicted without the meaning of the two preceding sections it shall be his duty to forthwith report the facts to the prosecuting attorney of the county in which such person is charged or was convicted."

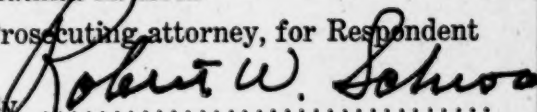
Respectfully, submitted,

  
Attorney for Petitioner

Receipt of a copy of within Petition for a Writ of Certiorari and Brief from Petitioner is hereby acknowledged this ..... day of January A. D., 1947.

Mathias H. Heck

Prosecuting attorney, for Respondent

By   
Assistant Prosecuting Attorney

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NO. 10



SUPREME COURT OF THE UNITED STATES

Ernest Stewart,

Petitioner,

January Term, 1947

-vs-

The State of Ohio,

Case No.....

Respondent

AGREED STATEMENT OF FACTS

It is hereby agreed and stipulated as an agreed statement of facts by and between the Petitioner and the Respondent that on the 31st day of May, 1945, at the April Term of the Common Pleas Court of Montgomery County, Ohio, Division of Domestic Relations, when cause No. 22864, Docket 39, styled The State of Ohio, Plaintiff, vs. Ernest Stewart, Defendant, came on for hearing upon the affidavit, petitioner was charged with contributing and acting in a manner tending to cause the delinquency of a minor under the age of eighteen years, as therein specified; that after a jury had been selected the prosecuting attorney requested leave of Court to amend said affidavit by inserting therein the following:-

It is further charged that the defendant has been formerly convicted, sentenced and imprisoned for a misdemeanor under the laws of Ohio.

Said amendment was permitted by the Court over the objection and exception of counsel for petitioner duly noted.

That during the trial the prosecuting attorney offered evidence of several occasions when the petitioner was convicted, sentenced and imprisoned for a misdemeanor under the laws of Ohio; that said evidence and testimony was permitted by the Court and

received by the jury over the objections and exceptions of counsel for the petitioner duly noted.

Approved:

*Heath E. Bledsoe*  
.....  
Attorney for Petitioner

Mathias Heck, Prosecuting Attorney,

by *Robert W. Schroeder*  
.....  
Assistant Prosecuting Attorney,  
for Respondent.